BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ERNEST R. ARNOLD Claimant	)	
VS.	)	Docket No. 1,024,395
OVERNITE TRANSPORTATION, INC.[1] Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the February 11, 2008, Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on June 3, 2008. Michael R. Lawless, of Lenexa, Kansas, appeared for claimant. Jeff S. Blosky, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found: "Based on the foregoing, lack of sufficient evidence of timely notice and report of injury, as provided in K.S.A. 44-501(a) and 44-520, no award is made to claimant at this time."[2] Thus, he determined that there was not sufficient evidence of timely notice of a May 4, 2004, accident and, accordingly, claimant was not entitled to an award for workers compensation benefits. It is not clear that the ALJ made any findings of fact or conclusions of law as to any of the other issues.

The Board has considered the record and adopted the stipulations listed in the Award. The issues before the ALJ were:

1. Whether or not Claimant met with accidental injury arising out of and in the course of his employment in Wyandotte County, Kansas in a series from May 5, 2004 through July 26, 2005.
2. Whether or not notice had been filed.
3. Whether or not proper written claim was made.
4. Whether or not Claimant is entitled to temporary total disability from May 5, 2004 through June 4, 2004.

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[1] During oral argument to the Board, counsel for respondent announced that Overnight Transportation, Inc., has been acquired by UPS Freight and that its insurance carrier is Liberty Insurance Company.

[2] ALJ Award (Feb. 11, 2008) at 14.

5. Whether or not claimant's wife's health insurance should be reimbursed in the amount of $12,229.88.

6. Whether or not claimant should be reimbursed for an out-of-pocket expense in the amount of $2,331.35.

7. Whether or not there is an offset for retirement and pension benefits through Overnite or now UPS.

8. Whether or not Claimant is entitled to unauthorized medical allowance.

9. Whether or not Claimant is entitled to future medical care and treatment.

10. Nature and extent of Claimant's disability, pursuant to K.S.A. 44-510d.[3]

ISSUES

Claimant asserts that the ALJ based his decision on the sole issue of whether claimant timely reported his initial traumatic injury of May 4, 2004, to his superiors.[4] Although claimant testified he gave timely notice of his injury to his supervisor, he further argues that he was injured in a series of accidents through his last day worked at respondent, July 26, 2005, and that notice and written claim were timely for that series of accidents. Claimant further requests that the Board remand this matter for further findings with respect to the issues not decided by the ALJ.

Respondent argues that claimant did not sustain an accidental injury that arose out of and in the course of his employment with respondent. If the Board finds that claimant suffered an injury that arose out of and in the course of his employment, respondent argues that his injuries were the result of a specific traumatic injury rather than a series of injuries through July 26, 2005. Respondent also argues that claimant did not provide timely notice or timely written claim of his alleged injuries. Respondent asserts that claimant is not entitled to an award of temporary total disability benefits for the period from May 5, 2004, through June 4, 2004; is not entitled to reimbursement to his wife's health insurance provider in the amount of $12,229.98; and is not entitled to reimbursement for his alleged out of pocket expenses. Respondent contends claimant's medical treatment was unauthorized, and, therefore, claimant is limited to a maximum recovery of unpaid medical expenses of $500. Respondent also argues that if claimant's injury is deemed compensable, it is entitled to an offset of any benefits awarded for pension benefits paid by respondent. Respondent further argues that claimant is not entitled to an award for future medical treatment. Finally, respondent argues that claimant is not permanently and totally disabled, is not entitled to an award of work disability, and, if his injuries are found to be compensable, is limited to an award of functional impairment in the amount of 22.5 percent, which is the average of the ratings of Dr. Clymer and Dr. Koprivica.

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[3] *Id.* at 2.

[4] Claimant's Application for Review by Workers Compensation Appeals Board and Claimant/ Appellant's Brief in Opposition to the Administrative Law Judges Partial Findings and Partial Conclusions also use May 5, 2004, as the date of the single traumatic accident.

The issues for the Board's review are:

(1) Did claimant suffer injury as a result of an accidental injury or injuries that arose out of and in the course of his employment? If so:

(2) Did claimant suffer either a single traumatic accident or series of accidents through July 26, 2005, or both?

(3) Did claimant give respondent timely notice and timely written claim?

(4) What is the nature and extent of claimant's disability?

(5) Is claimant entitled to authorized and unauthorized medical expenses?

(6) Should claimant's wife's health insurance be reimbursed in the amount of $12,229.88?

(7) Should claimant be reimbursed for out-of-pocket medical expenses?

(8) Is respondent entitled to an offset for retirement and pension benefits claimant is receiving through respondent?

(9) Is claimant entitled to future medical?

(10) Is claimant entitled to temporary total disability benefits from May 5, 2004, through June 4, 2004?

(11) Should claimant's Exhibit 2 to the Regular Hearing held September 25, 2007, be admitted into evidence?

(12) Should this case be remanded to the ALJ for decisions on all issues other than the issues actually decided by the ALJ, or does the Board have jurisdiction to consider all issues ?

FINDINGS OF FACT

Claimant was 63 years old at the time of the regular hearing. He worked as a trailer mechanic for respondent from March 1987 to July 26, 2004. He testified that on May 5, 2004,[5] at about 8:30 a.m., he injured his back jerking on the rear sliding door of a trailer that was jammed. He immediately felt pain in his low back and down his right leg.

[5] At claimant's discovery deposition held November 9, 2005, he testified to a date of accident of April 15, 2004. However, later in the deposition he admitted that the date of accident was in early May 2004 because he first saw a doctor on May 6, 2004, complaining of pain that started two days earlier.

Although he knew he had been injured, he thought he had just pulled some muscles. He testified that he told his shop manager, Dennis Warner, about the injury.[6] Claimant said that Mr. Warner told him to go home.

Claimant went to see his personal physician, Dr. Donald Frein, on May 6, 2004. He said he told Dr. Frein that he had hurt his back at work, but Dr. Frein's medical records do not mention a work-related accident. Dr. Frein sent claimant for an MRI, which was done on May 13, 2004, and revealed he had herniated disks. When claimant found out what his problem was, he called David Atchley, respondent's area director. He said he told Mr. Atchley about having injured himself jerking on the rear door of a truck, but he does not remember if he asked for medical treatment at that time.

Dr. Frein took claimant off work for about four weeks, and then claimant returned to work performing the same job he had been doing before the injury. Claimant contends he told respondent that he did not think he should be climbing ladders because of the pinched nerve in his leg, as he was afraid the leg could go out from under him. However, since climbing ladders was part of his job, he did the best he could. He said he worked slower and was less productive at work after his accident. He wore a back brace around his mid section every day to protect his low back. However, every day he worked, it felt like his condition was getting worse. He continued to treat with Dr. Frein. His medical bills were covered under his wife's health insurance plan.

Claimant claims he continued to have problems at work. He said he frequently spoke with Mr. Warner about his back problems because Mr. Warner's wife also suffered from back problems. Finally, on January 25, 2005, he talked to Mr. Atchley about being hurt at work. Claimant said that Mr. Atchley called the benefits department in Richmond, Virginia, and spoke with a person by the name of Carrie Dillard, who told him to treat the injury as if it had occurred the day before. Claimant, however, said he refused to use the wrong date of accident and filled out the accident form stating that the date of accident was May 5, 2004. Respondent sent claimant to see a Dr. Smith. But when claimant appeared for the appointment, Dr. Smith told him his workers compensation claim had been denied by the respondent and that he would not see him.

Claimant was off work again because of his back from May 9 to June 13, 2005, during which period he was having a series of epidural steroid injections. Claimant returned to work after June 13, again performing his regular job duties with no restrictions, modifications, or accommodations. Claimant was terminated from his job on July 26, 2005.

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[6] At his discovery deposition, claimant testified that he told his immediate supervisor, Dwight Van Swearingen, about his injury. However, at the regular hearing (Sept. 25, 2007), he testified that he had mistakenly testified that he had spoken with Mr. Van Swearingen but that he was positive he, instead, spoke with Dennis Warner.

Jeffrey Wry is the hub manager for respondent and is in charge of the Kansas City, Kansas terminal. To his knowledge, claimant did not report a work injury in April or May 2004. He first became aware that claimant alleged a work injury in January 2005. He was aware that claimant took FMLA and sick leave in May 2004 but said FMLA and sick pay paperwork are not given to employees who allege an on-the-job injury. There was no indication on the FMLA or sick leave paperwork that the leave was being requested because of a work injury.

Mr. Wry testified that after claimant returned from his FMLA and sick leave, he returned to work full time at his regular job duties. To his knowledge, claimant was able to perform all his regular job duties without restrictions or accommodations. Mr. Wry was made aware of any employee who needs accommodations or who has restrictions. No one made him aware that claimant was unable to perform his regular full time duties. At no time did he see claimant exhibit any signs of having problems with his back.

Harvey "David" Atchley currently works for respondent as Southwest region team leader. His previous position with respondent was director of the Western Division, which was his title for the period of April 2004 through July 2005. He was in charge of all respondent's shops and maintenance for the western part of the United States. From April 2004 to January 25, 2005, claimant did not report to Mr. Atchley that he had been injured on the job. On January 25, 2005, claimant came into his office and told him that he had hurt his back on the job the year before. Mr. Atchley then took out an employee supervisor's report of injury. In the section asking for a description of the accident, Mr. Atchley wrote that claimant reported to him on January 25, 2005, that he had injured his back on May 5, 2004. Mr. Atchley testified that claimant filled out the employee's report after Mr. Atchley filled out his portion.

Although on the Employee's Report of Accident form, claimant indicated that he had reported his injury to the area director on May 6, 2004, Mr. Atchley said that claimant did not tell him in May 2004 that he had hurt his back on the job. He remembers claimant being off work in May 2004 on FMLA and short-term disability. In fact, he signed the severe sick leave application submitted by claimant on May 20, 2004. He testified that if claimant had reported in May 2004 that he had injured his back on the job, Mr. Atchley would have filled out the supervisor's report of injury at that time, and claimant would not have been sent FMLA and sick leave documents. After signing off on the severe sick pay application and the FMLA forms, Mr. Atchley had no further discussions with claimant in May or June 2004 about his back. The next time he recalls talking with claimant about his back was in January 2005.

From the date claimant reported the injury until he was terminated in July 2005, Mr. Atchley saw claimant on occasion at the shop. He did not recall claimant telling him that his back condition was worsening, nor did he observe claimant acting as if he were in pain. To his knowledge, claimant was able to continue performing all his regular job duties without restrictions, assistance, modification or accommodation.

Dennis Warner is the maintenance manager at respondent. He was promoted to maintenance manager in March 2005. Before then, he was a road driver. Although claimant testified that he was positive he told Mr. Warner about his work injury the date of the accident, in May 2004 Mr. Warner was a road driver and was not claimant's supervisor. He said that claimant did not tell him on May 5, 2004, that he had injured his back working on a trailer. He did not become claimant's supervisor until he became maintenance manager in March 2005.

After Mr. Warner became maintenance manager, he saw claimant on a daily basis. Between March and July 2005, he had opportunities to see claimant performing his job and walking around the shop. He never saw claimant walking bent over or dragging his leg or foot during that period of time. He never saw that claimant was having problems performing his job. Claimant did not appear to be in pain while performing his job duties. Claimant never told him he was unable to perform his duties due to pain or complain about his ability to perform his job duties. Claimant continued to perform all his regular job duties without restrictions or changes in his job duties.

Mr. Warner said he and claimant did not have frequent discussions about his back pain getting worse in the last few weeks of his employment as claimed by claimant. He never told claimant that he could see he was in pain. Mr. Warner's wife does have back problems and had surgery. He and claimant discussed his wife's surgery on only one occasion in March or April 2005, at which time claimant told him that his back was sore.

Dwight Van Swearingen is the first shift supervisor of fleet services for respondent. From April 2004 through July 2005, he was claimant's immediate supervisor. As such, he had the opportunity to observe him performing his work after the alleged accident. He said he never saw claimant have any physical problems performing his job. Claimant did not tell him he was unable for physically perform his job duties, nor did he complain about his ability to perform his job duties.

From April 2004 through July 2005, claimant never reported to Mr. Van Swearingen that he had injured his back working at respondent. The first he heard that claimant was alleging a work injury was after claimant reported an injury to Mr. Atchley. Claimant did not tell Mr. Swearingen on May 5, 2004, that he had hurt his back lifting a trailer door or working on a trailer. Claimant did not tell him, on May 5, 2004, or anytime between April 2004 and July 2005, that he had hurt his back and was going home. He never observed claimant walking bent over, dragging his leg or foot, or appear to be working in pain. Claimant performed his job duties without any restrictions, modifications or accommodations.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's

right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[7]

[7] K.S.A. 2007 Supp. 44-501(a).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

K.S.A. 2007 Supp. 44-508(d) defines "accident" in part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2007 Supp. 44-508(e) defines "personal injury" and "injury":

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

In *Treaster*,[9] the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or mini-traumas was the last date that a worker (1) performed services or work for an employer or (2) was unable to continue a particular job and moved to an accommodated position. In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*,[10] in which the Court of Appeals held that the date of accident for a repetitive trauma injury was the last day worked when the worker left work because of the injury. The long line of cases applying the rule for the last date possible as the date of accident was altered by the Legislature's July 1, 2005, amendment to K.S.A. 44-508(d), which now states that a claimant's date of accident is the earliest of several triggering events:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which

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[8] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[9] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[10] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

> the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[11]

K.S.A. 2007 Supp. 44-555c(a) states in part:

> There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

ANALYSIS AND CONCLUSION

The Board agrees with and affirms the ALJ's determination that claimant did not give timely notice of his alleged May 4, 2004, accident. Claimant's testimony that he told Mr. Warner and Mr. Atchley of his injury is directly contradicted by those individuals. Their denial of having received any such notice or having actual knowledge is supported by the fact that the claimant's medical records of his treatment during 2004 likewise fail to mention an accident at work or that his back injury is work related. The issue then becomes whether claimant suffered a series of accidents through July 26, 2005, his last day performing work for respondent. If so, then the letter from claimant's attorney and the attached written Claim for Compensation which were served on respondent on August 2, 2005, may have been timely for both notice of accident and written claim for compensation. Claimant contends the ALJ failed to address this issue.

Before reaching the issue of what is the date of accident for the series, the Board must first determine if the ALJ decided this issue and any of the other issues, including whether claimant, in fact, suffered a series of accidents after May 4, 2004, or any work-related accident or aggravation of a preexisting condition. If not, in the absence of an agreement for the Board to address these issues for the first time on appeal, then the Board will remand the matter to the ALJ for a determination of those issues.

Respondent argues that it is "[i]mplicit in his decision . . . that Claimant sustained accidental injury arising from a specific traumatic incident, rather than a series of accidents, and that Claimant failed to give timely notice and make timely written claim of his alleged

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[11] K.S.A. 2007 Supp. 44-508(d)

injuries."[12] However, it is not clear to the Board that the ALJ made any such findings. The ALJ cites K.S.A. 44-520, the notice statute, but does not cite the written claim statute, K.S.A. 44-520a. The ALJ says there was a lack of evidence as to "report of injury" but then cites K.S.A. 44-501(a), but for what purpose is unknown. Perhaps the ALJ was deciding that claimant failed to prove that he suffered "personal injury by accident arising out of and in the course of employment." On the other hand, this citation of K.S.A. 44-501(a) may only have been a reference to the burden of proof being on the claimant. In any event, the Board finds that the ALJ failed to determine if claimant suffered a series of accidents and aggravations of his back injury. Accordingly, the Board will remand this claim to the ALJ for a determination of that issue and any remaining issues.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated February 11, 2008, is affirmed as to the finding of no timely notice of the single traumatic accident of May 4 or May 5, 2004, but reversed as to the denial of compensation because of the failure to decide if claimant suffered a series of accidents, and this matter is remanded to the ALJ for further findings and conclusions on that and the other remaining issues.

IT IS SO ORDERED.

Dated this _____ day of June, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael R. Lawless, Attorney for Claimant
Jeff S. Blosky, Attorney for Self-Insured Respondent
Robert H. Foerschler, Administrative Law Judge

[12] Respondent's Brief at 18 (filed Apr. 23, 2008).